IN THE

Supreme Court of the United States

October Term, 1978

No. 78-902

SHOPMEN'S LOCAL UNION NO. 455, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

—and—

INDEPENDENT ASSOCIATION OF STEEL FABRICATORS, INC., etc., et al.,

Respondents,

—and—

LOCAL 810, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, hereby requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on September 6, 1978.

OPINIONS BELOW

The decision of the Court of Appeals was rendered on June 30, 1978. It is reprinted in the Appendix at page 8a. The decision and order of the National Labor Relations Board are reprinted in the Appendix at page 43a, and are reported at 231 NLRB No. 31.

JURISDICTION

The judgment of the Court of Appeals was entered on September 6, 1978 (Appendix at page 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the decision of the Court below which permitted the unilateral withdrawal of employers from a multi-employer bargaining unit after the commencement of joint negotiations, and which failed to require the Association and the individual employers thereafter to bargain with Local 455 despite flagrant unfair labor practices committed by both the Association and the Independent Employers is erroneous and imperils the future of multi-employer bargaining by freeing respondents from any effective sanction?

2. Whether individual employers, bargaining through a multi-employer association, should be permitted to withdraw from

the association after an impasse in bargaining and if so, are they thereafter obliged to bargain with the union on an individual basis?

3. May an unconditional offer by a union on behalf of strikers to return to work, be refused, because the union in a separate communication which made no reference to the strikers asked the company to sign a contract with it?

STATUTES INVOLVED

Section 8(a)(1) of the National Labor Relations Act [29 U.S.C. § 158(a)(1) p. 5] provides as follows:

> "(a) It shall be an unfair labor practice for an employer -
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

The pertinent provisions of Section 8(a)(2) [29 U.S.C. § 158(a)(2)] are as follows:

> "(a) It shall be an unfair labor practice for an employer -
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

The relevant provisions of Section 8(a)(3) [29 U.S.C. § 158(a)(3) are as follows:

> "(a) It shall be an unfair labor practice for an employer -
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Section 8(a)(5) [29 U.S.C. § 158(a)(5)] states:

> "(a) It shall be an unfair labor practice for an employer -
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

STATEMENT OF THE CASE

Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (hereinafter referred to as "Local 455" or "Union") for many years was the collective bargaining representative of the production and maintenance employees of the individual Respondent Employers, each of which was party to successive collective bargaining agreements with the Union. The last of such

contracts expired on June 30, 1975 (ALJ* 4, 5).

In 1975 Respondent Employers, together with certain other employers formed the Independent Association of Steel Fabricators, Inc. (hereinafter, "Association"), which thereupon requested Local 455 to bargain with it on behalf of its member employers. Local 455 agreed to so bargain as to Respondent Employers and several other employers. The parties thereupon commenced bargaining on that basis, but failed to reach agreement prior to June 30, 1975 and on July 1, 1975 a strike ensued (ALJ 5, 6, 8).

The record establishes, and the National Labor Relations Board (hereinafter, "NLRB") found ultimately that the Association and employer members embarked on a course designed to replace Local 455 (ALJ 6). The Association retained a labor relations advisor who was an arbitrator under a contract between Local 810 of the International Brotherhood of Teamsters (hereinafter, "810") and another employers group (ALJ 15). He informed them that other unions might be interested in their employees, and on the Association's consent, arranged to have 810 contact their employees (ALJ 15, 16). Arrangements were also made to have 810's

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* "ALJ" refers to pages of the Administrative Law Judge's decision which was adopted by the Board.

president address the Association (ALJ 15). He advised the assemblage that costs under the 810 contracts were less than under a contract with Local 455. Employer members visited 810 headquarters and examined its contracts (ALJ 14, 16). Respondent Employers began a coercive campaign to force their employees to join 810, despite the fact that the vast majority of their employees joined the Local 455 strike and remained loyal to it (ALJ 17). Among other things, the Respondent Employers promised benefits to employees if they joined 810; they made threats of plant closure and discharge of employees, if they did not; they transported their employees to 810's offices; and they did, in fact, discharge employees who resisted their demand for support of 810. They advised their employees that they would never sign a contract with Local 455 (ALJ 17-24, 55, 56).

Finally, between November 1975 and February 1976, despite their legal obligations, and in disregard of their employees' desires, nine of the Respondent-Employers actually signed contracts with 810. These contracts required, as a condition of employment, that employees become and remain members of 810, and also provided for deduction of union dues (ALJ 26).

On January 16, 1976, the Association wrote to the Union advising it that nineteen of its members (including Respondent Employers) had withdrawn bargaining authorization from the Association. Local 455 received the letter on January 19, 1976. The Union did not consent to said withdrawals (ALJ 12, 13).

As of January 16, 1976 six Respondent Employers had signed contracts with Local 810, i.e., Roman, Greenpoint, Paxton, Melto, Long Island and Mohawk (hereinafter referred to as class one employers, as they were so referred to by the Circuit Court). Three other Respondent Employers, signed with Local 810 after the January 19, 1976 notice of withdrawal from the Association, i.e., Master, Koenig, and Cervenka (hereinafter referred to as class two employers, as they were so referred to by the Circuit Court). Seven other employers gave notice of withdrawal but did not sign an agreement with either Local 810 or Local 455, i.e., Zaffino, Ikenson, Achilles, Kuno, Peele, Spigner, and Roma (hereinafter referred to as class three employers, as they were so referred to by the Circuit Court).

On January 23, 1976, Local 455 met with and signed identical contracts with the five remaining employers who had not withdrawn their authorization from the Association to bargain. They signed individually, and as "members of the Association" at Local 455's insistence and on the assertion of the president of Local 455 that he was dealing with them as the Association. Two additional members subsequently signed (Trojan and Heuser) (ALJ 13, 14, 49, 50).

The Union thereupon sent a letter to the balance of the Respondent Employers asking them to sign the said contract. They refused to do so. The Union sent a separate communication to each Respondent Employer making an unconditional offer on behalf of their employees to return to work. They

refused this request as well. None of the striking employees were reinstated.

THE BOARD'S CONCLUSIONS AND ORDER

The principal findings of fact and conclusions of law of the Administrative Law Judge were adopted by the Board in a decision dated August 11, 1977. The Board found that:

1) Respondent Employers and Respondent Association had wrongfully solicited their employees to abandon Local 455 and to join 810, and had rendered unlawful assistance to 810 in violation of Sections 8(a)(1) and (2) of the Act (ALJ 25, 60). Respondents made threats to close their plants and/or to discharge their employees in order to induce them to support 810 and to abandon Local 455, in violation of Section 8(a)(1) and (2) of the Act (ALJ 25, 60). The execution of the collective bargaining agreements between nine Employer Respondents and 810 was unlawful and contrary to the employers' legal obligations to bargain with Local 455, and also constituted unlawful assistance to 810 in violation of Sections 8(a)(1)(2) and (5) of the Act (ALJ 25, 26, 59, 61).

2) At the time of the Respondent Employers' withdrawal from the Association there was no impasse in bargaining, and in any event an impasse would not justify withdrawal from Association bargaining.

3) By withdrawing from multi-employer bargaining and by refusing to acquiesce in the Union's demand that they execute the January 23rd agreement, the Association and the Employer Respondents (except for Trojan and Heuser) violated Sections 8(a)(1) and (5) of the Act (ALJ 61).

4) The Respondent Employers had wrongfully refused to reinstate their striking employees, an unconditional offer to return to work having been made on their behalf by the Union.

The Board ordered the respondents inter alia, to cease and desist from their 8(a)(1)(2) and (5) violations of the Act; and to recognize and bargain collectively with Local 455; to implement and adopt the contract negotiated by the five employer members of the Association; and ordered all employers who had bargained collective agreements with Local 810, to cease and desist from recognizing said Local and to cease giving effect to the collective bargaining agreement with Local 810 or any renewal thereof unless and until Local 810 was certified by the Board.

THE COURT OF APPEALS' DECISION

The Court enforced that portion of the Board's order which was based on its finding that certain Respondent Employers had solicited their employees to join 810 and to abandon Local 455 in violation of Sections 8(a)(1) and (2) of the Act. The

Court also agreed with the Board that the Employer Respondents, by threatening to close their plants and/or discharge their employees in order to induce them to join 810 had violated Section 8(a)(1) of the Act, and that the Association violated Sections 8(a)(1)(2) and (5) of the Act by their aid to and support of 810, and by their unlawful solicitation and other actions directed to getting their employees to abandon Local 455 and to join 810.

The Court in disagreement with the Board found that an impasse in negotiations had occurred by January 19, 1976 when Local 455 received a withdrawal letter signed by nineteen members of the Association (page 3771 of the decision). The Court held further that an impasse in negotiations justifies a party's unilateral withdrawal from multi-employer negotiations. The Court held that the Board's order that respondents were bound by the agreement negotiated by five members who had not withdrawn from the Association could not be enforced as there was no agency relationship between the majority and minority who had signed the contract (page 3777 of the decision). The Court ruled in addition, that the striking employees were not entitled to reinstatement, as the Union had sent a letter to each member employer asking it to sign the contract, and that such communication in effect made its unconditional offer to return to work, conditional.

As to the Respondents' obligation to bargain with Local 455, the Respondent Employers were separated into three classes:

those who signed with Local 810 before giving notice of withdrawal (designated class one); those who signed after giving notice of withdrawal (designated class two); and those who gave notice of withdrawal but did not sign an agreement with either union (designated class three).

The Court enforced those portions of the Board's order requiring respondents in class one to cease recognition of and to abrogate their contracts with Local 810 unless and until it is certified. However, the Court did not impose a bargaining order but left it to the Board's discretion whether to do so, presumably upon the petition of an interested party.

The Court ruled as to class two employers that Local 455 as the incumbent was "entitled to a rebuttable presumption of continued majority status" (p. 3779), and that the execution of contracts with Local 810 constituted a refusal to bargain which was excusable only if Local 455 had lost its majority or the employers had a rational basis for doubting its majority. The Court again decided that the Board should make the determination whether a bargaining order should be imposed.

With respect to class three employers the Court ruled that the "union apparently never elected to request bargaining with the individual employers". The Court held that it could not conclude that those respondents in class three who signed with neither union unlawfully refused to bargain and therefore found that these respondents did not violate Section 8(a)(5) (p. 3780).

Finally while stating that it would ordinarily remand the case to the Board for further proceedings in conformity with the opinion, the Court did not do so but left it to the parties to petition the Board for further evidentiary hearings if such were desired (p. 3786, n. 37).

REASONS FOR GRANTING THE WRIT

1. THE INSTANT CASE IN WHICH THE COURT OF APPEALS PERMITTED THE UNILATERAL WITHDRAWAL OF EMPLOYERS FROM A MULTI-EMPLOYER BARGAINING UNIT AFTER THE COMMENCEMENT OF JOINT NEGOTIATIONS, AND WHICH FAILED TO REQUIRE THE ASSOCIATION AND THE INDIVIDUAL EMPLOYERS TO THEREAFTER BARGAIN WITH LOCAL 455 DESPITE THE COMMISSION BY BOTH THE ASSOCIATION AND INDIVIDUAL EMPLOYERS OF EXTENSIVE AND PERVASIVE UNFAIR LABOR PRACTICES, PRESENTS AN IMPORTANT QUESTION OF LAW WHICH HAS NOT HERETOFORE BEEN PASSED UPON BY THIS COURT

The Court below, in disagreement with the NLRB, found that an impasse in negotiations had occurred and that the impasse constituted a special circumstance justifying unilateral withdrawal from the multi-employer unit. Assuming, for the

purposes of this argument, that the decision of the Court accurately reflects applicable law, the Court nevertheless erred in failing to provide any effective remedy for the egregious unfair labor practices committed by the Association; in failing to consider the effect of the unfair labor practices in determining whether a genuine impasse had occurred which warranted withdrawal from the multi-employer unit; and in establishing principles which will inevitably destroy the integrity of multi-employer bargaining and the benefits which such bargaining was designed to effectuate.

Bargaining between unions and employers on a multi-employer basis is of long standing duration. It exists because it offers advantages to both labor and management, and is effective in creating the stability in labor relations which was one of the main objectives of the Labor-Management Relations Act. For the union there is a saving of time and money in negotiating a single contract instead of many; it also enables a union to achieve its goal of equalizing wages and working conditions of employees and employers in a common field. Furthermore many benefits that individual employers could not singly provide are achievable on a multi-employer basis. For employers the practice offers individual employers increased bargaining power in dealing with a union. In addition, employers in such a bargaining unit can have greater confidence that their competitors will not enjoy more advantageous terms. See generally, Comment, The Status Of Multi-Employer Bargaining Under

The National Labor Relations Act, 1967 Duke L. J. 558.

Of course, the public benefits of multi-employer bargaining are manifest. Such bargaining has led to greater stability in labor relations especially in industries where there are many small units which makes bargaining on a multi-employer basis so much more rational and effective in preventing labor strife. See N.L.R.B. v. Sheridan Creations, Inc., 357 F.2d 245 (CA 2 1966); N.L.R.B. v. Tulsa Sheet Metal Works, Inc., 367 F.2d 55 (CA 10 1966).

Multi-employer bargaining received official sanction in N.L.R.B. v. Teamsters Local 449 (Buffalo Linen), 353 U.S. 87 (1957). There are no statutory provisions providing for multi-employer bargaining. The Board derives its power to certify multi-employer units from 29 U.S.C. § 159 (b) which provides:

> "The Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . ."

The Board reads this section in conjunction with 29 U.S.C. § 152 (2) which defines the term employer as including an "agent of an employer". The Board deems the multi-employer assoication to be the agent of each of its members, thus permitting it to exercise its power under Section 159(b) to certify an "employer" unit as appropriate

for bargaining. See Waterfront Employers Association of the Pacific Coast, 71 NLRB 80, 109 where the Board found an association to be an employer even prior to the 1947 Taft-Hartley Amendments to the Act. In the Buffalo Linen case, supra, this Court decided that Congressional refusal to interfere with multi-employer bargaining at the time of the Taft-Hartley Amendment debates, despite proposals to do so, demonstrated its recognition of multi-employer bargaining as a "vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." 353 U.S. at 95.

The decision of the Court below could herald the demise of multi-employer bargaining. While finding that the Association and a number of individual employers committed serious unfair labor practices, the Court did not order any remedy to deal with the Association's refusal to bargain with Local 455. It refused to attribute the illegal practices of their agent, to the employers. If a multi-employer association can commit unfair labor practices with impunity, unions would be foolhardy at best to deal with employers on that basis. Indeed the Court's decision permits the employers to avoid reaching agreement with few untoward consequences. Unions will not long countenance such action, and the obvious consequence will be an avoidance, if not end, of this type of bargaining with all of its advantages and conceded benefit to labor peace and the public good.

There are no cases directly on point involving the right of employers to withdraw from a multi-employer unit after the association has committed unfair labor practices, but both the Board and the courts have long recognized that it would be anomalous to allow an employer's unfair labor practices to create or contribute to an impasse which might then justify bypassing the bargaining representative and permit the employer to take unilateral action.

In Industrial Union of Marine and Shipbuilding Workers v. N.L.R.B., 320 F.2d 615 (CA 3 1963), the employer contended that its unilateral alteration in the conditions of employment was not proscribed since at the time it instituted the changes a bargaining impasse had been reached. The Court rejected the argument noting:

> ". . . It is manifest that there can be no legally cognizable impasse, i.e., a deadlock in negotiations which justifies unilateral action, if a cause of the deadlock is the failure of one of the parties to bargain in good faith." 320 F.2d at 621.

See also, N.L.R.B. v. Herman Sausage Company, 275 F.2d 229, 234 (CA 5 1960).

Therefore even if an impasse existed, the Court erred in ignoring the fact that the unfair labor practices committed by the Association (and indeed of the individual Employers) created the impasse and in any event in failing to determine whether

those unfair labor practices required the imposition of effective remedial action.

It is well settled that an employer is responsible for the statements or acts of its agents N.L.R.B. v. LaSalle Steel Company, 178 F.2d 822 (CA 7 1949), cert. den'd. 340 U.S. 810 (1951); Joy Silk Mills, Inc. v. N.L.R.B., 185 F.2d 732 (CA D.C. 1950), cert. den'd. 341 U.S. 914 (1951). Under the law of agency a principal is responsible for the acts of the agent within the scope of the agent's general authority, even though the principal has not specifically authorized or has even forbidden the acts in question. International Longshoremen's and Warehousemen's Union, Local 6, 79 NLRB 1487 (1948).

In this case, for the first time, a contrary proposition has been established. The agent association is found guilty of unfair labor practices and is ordered to cease and desist from its illegal activity (a meaningless and futile gesture as the Employers have been permitted to withdraw therefrom and it is now nothing more than a shell) while the Employers, as principals, are not held responsible for the illegal acts of their authorized agent.

An employer association, which is the agent of the employers which bargain through it, is responsible for violations of law committed by it. Thus an employer association that had negotiated an illegal union security contract was held responsible together with the individual employer when a worker was denied a job under the contract. N.L.R.B. v. George D. Auchter Company, 209

F.2d 273 (CA 5 1954).

We are aware of no case in which the agent alone bears the burden while the employer is held free from fault. Here moreover, the situation is exacerbated in view of the fact that the Court sanctioned the Employers' withdrawal of authorization from the Association following the unlawful practices which renders the purported remedy, limited as it already is, meaningless as the Association is concededly no longer a viable entity.

It is of some significance in assessing the Court's conclusions in this area to contrast its findings as discussed above, with its findings with respect to the union's role as agent of the employees it represents.

The Board found, and the Court agreed, that the strikers were wrongfully discharged. Nevertheless the Court refused to enforce the Board's order requiring reinstatement of the employees. Here the Court found that the Union was the agent of the employees in making applications for reinstatement. Although the Union made such an unconditional application in a letter to each employer, as the Union had requested the employers to sign an Association contract with it in another communication, the Court assumed that the application made by the Union in the separate letter sent on behalf of the employees was conditional, and the employees who were wrongfully discharged were denied reinstatement and the right to be made whole.

In addition, the Court below failed

to consider the impact of this Court's decision in N.L.R.B. v. Gissel Packing Co., 395 U.S. 75 (1969) in determining an appropriate remedy for the Association's unfair labor practices. In the Gissel case the Court held that a bargaining order may issue without the necessity of an election not only in "'exceptional' cases marked by 'outrageous and pervasive' unfair labor practices", but also in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine union strength and impede the election processes." 395 U.S. at 613, 614.

Both the Board and courts have found employer conduct similar to that engaged in here by the Association and various individual member employers to warrant a Gissel type bargaining order. See Oahu Refuse Collection Company, 212 NLRB No. 51 (1974); N.L.R.B. v. Hendel Mfg. Co., 483 F.2d 350 (CA 2 1973); Wallgreen Company v. N.L.R.B., 509 F.2d 1014 (CA 7 1975) (threats of reprisals concerning job securirty and threats of plant closure); Lawrence Rigging, Inc., 202 NLRB 1094 (1973); Harpeth Steel, Inc., 208 NLRB 545 (1974); N.L.R.B. v. Rollins Telecasting Co., Inc., 494 F.2d 80 (CA 2 1974) (unlawful support and assistance of a rival union or suggestions that employee committee be formed).

The Court below did not issue such an order here presumably because the Board did not make any findings that such an order was appropriate. The Board however did not have occasion to pass on this issue as it had found that the Association had unlawfully refused to bargain with Local 455

on other grounds. Therefore, at the very least, the Court should have enforced the bargaining order as an appropriate remedy in any event, in light of the pervasive unfair labor practices committed by both the Association and the individual employers.

The Court's failure to require those employers who gave notice of withdrawal but who did not sign an agreement with any union, to bargain with Local 455 on the ground that the latter never requested bargaining on an individual employer basis, is further evidence of its failure to consider the harmful effects its decision will have on multi-employer bargaining. Its ruling can only lead to a drastic diminishment of the effectiveness of such bargaining, inasmuch as it permits an employer to be free of any bargaining obligation if an impasse occurs which will have the foreseeable effect of encouraging impasses in negotiations. It also puts the Union in an untenable situation. The Union, if it requests employers to bargain on an individual basis, has to assume, at the very least, that an impasse has occurred or it will have committed an unfair labor practice itself. Morand Bros. Beverage Co., 91 NLRB 409 (1950), enforced, 190 F.2d 576 (CA 7 1951). For the Union to request individual bargaining also places upon the Union the onus of destroying the multi-employer unit.

In this case the Union assumed, and the Board found, that all the employers were obliged to bargain through the Association. It never agreed to release any

employer. All of the employers were obviously aware of the union's desire to bargain. Hence the Court improperly released these employers from any bargaining obligation.

Since the Association, as agent for its members, committed serious unfair labor practices, as did a number of individual employers, to allow some of the employers to escape without any bargaining obligation and thereby deprive their employees of a bargaining representative solely on the basis of the failure to request individual bargaining is surely to exalt form over substance. The Court's decision ignores the many cases which have held that a request to bargain is not necessary under certain circumstances. (See infra, p. 21).

The Court did require those employers who signed with Local 810 after giving notice of withdrawal, to bargain with Local 455 unless they could show actual loss of majority status or a rational basis for doubting Local 455's majority status. The reasoning of the Court is that since these employers intended to sign with some union, they were under a duty to bargain with Local 455 on an individual basis before negotiating with any other union.

In any event it is well settled that a request to bargain is superfluous where a bargaining order is designed to remedy unfair labor practices other than a refusal to bargain. See N.L.R.B. v. Gissel Packing Company, supra; Steelworkers v. N.L.R.B. (Northwest Engineering Company), 376 F.2d 770 (CA D.C. 1967), cert. den'd. 389 U.S.

932 (1967); American Sanitary Products Company v. N.L.R.B., 382 F.2d 52 (CA 10 1967); Bryant Chucking Grinder Company, 160 NLRB 1526 (1966). Cf. Wausa Used Steel Corp., v. N.L.R.B., 377 F.2d 369 (CA 7 1967).

Recently the Board held in Beasley Energy, Inc., 228 NLRB No. 16, 94 LRRM 1563 (1977), that a Gissel bargaining order is appropriate even though the union which had a card majority did not make a bargaining demand. The employer was ordered to bargain from the date it initiated the unlawful conduct which prevented the holding of a fair election.

Neither the employees of the employers in group three nor the employers themselves filed a petition for decertification or for an election. Cf. Linden Lumber Division, Summer & Co. v. N.L.R.B., 419 U.S. 301 (1974). The class three employers should at the very least be required to prove that Local 455 did not represent a majority or that the employers had a good faith doubt of the Union's majority status. As the Court in N.L.R.B v. Tahoe Nugget, Inc., 99 LRRM 2509, 2517 (CA 9 1978)(not officially reported) succinctly noted:

> "If an employer could routinely negate the presumption of union majority status by withdrawing from a bargaining association, unions might refuse to consent to multiple party bargaining and this effective device for promoting industrywide peace would be lost."

The presumption of majority status is clearly applicable in this case. The Board recognized this in Sahara-Tahoe Corp., 229 NLRB No. 151, 96 LRRM 1583, enforcement granted 99 LRRM 2837 (CA 9 1978) when it stated:

> "It is well settled that the existence of a prior contract, lawful on its face, raises a dual presumption of majority - a presumption that the union was the majority representative at the time the contract was executed, and the presumption that its majority continued at least through the life of the contract. Following the expiration of the contract, the presumption continues and, though rebuttable, the burden of rebutting it rests on the party who would do so."

II. WHETHER AN INDIVIDUAL EMPLOYER MAY UNILATERALLY WITHDRAW FROM A MULTI-EMPLOYER BARGAINING UNIT AFTER THE COMMENCEMENT OF NEGOTIATIONS UPON THE OCCURRENCE OF AN IMPASSE PRESENTS AN IMPORTANT QUESTION OF LAW WHICH HAS NOT HERETOFORE BEEN PASSED UPON BY THIS COURT.

In Point I we proceeded upon the assumption that an employer could lawfully withdraw from a multi-employer association

if an impasse in negotiations occurred. However that question has never been decided by this Court (cf. N.L.R.B. v. Teamsters Local 449 [Buffalo Lines], 353 U.S. 87, 94 n. 22 (1957) and the Court below and the Board are in disagreement over the effect of an impasse on the right to withdraw from the multi-employer unit.

The position of the Court that withdrawals are permissible whenever impasse is reached in bargaining creates serious problems in the multi-employer situation. Impasse as a standard for withdrawal will inevitably lead to confusion as to the rights of all the parties as there is no set formula for determining when a genuine impasse has occurred (witness the disagreement between the Board and the Court in this case). A wrong determination can lead to dire consequences as the striking employees in this case discovered.

For the above reason among others, the Board had held that to permit withdrawal whenever an impasse is reached "would effectively negate the benefits of [multi-employer] bargaining to all parties and to employees. . . ." Hi-Way Billboards, Inc., 206 NLRB 22, 23 (1973), enforcement denied 500 F.2d 181 (CA 5 1974). The Board's reasoning was that a genuine impasse was not the end of collective bargaining but a not unusual phase in negotiations during which the parties could resort to economic pressure to break the stalemate.

The Court's decision ignores the fact that an impasse can often only be avoided or broken by a willingness to

compromise. Such compromises will be discouraged if employers can use an impasse as an event that permits them to delay or, as the Court ruled with respect to the class three employers, to avoid reaching an agreement altogether.

Thus the Board ruled that an impasse is not an "unusual circumstance" which would permit a unilateral withdrawal from multi-employer negotiations. To decide otherwise "would allow an employer to seize upon such an occurrence and use it as a ground for withdrawal merely because it was dissatisfied with the impending agreement. . . ." Hi-Way Billboards, Inc., 206 NLRB at 23, 24.

As the Board and the Court differ on this important question which affects bargaining in many prominent areas of industry and which has a significant impact on commerce, this Court should grant certiorari to resolve this issue.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should issue.

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